Supreme Court, U.S.
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No. 96-124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,
Petitioners,
v.
BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF BANKATLANTIC FINANCIAL CORPORATION AND ALAN LEVAN

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QUESTION PRESENTED

Petitioners have framed their questions based upon an erroneous version of the facts. The appropriate question is:

> May a non-party whose only interest in a case is a potential collateral estoppel effect intervene as of right in that case in an attempt to prevent a district court from setting aside its own prior interlocutory order, an action necessary to effectuate a settlement agreement between the parties reached after a jury verdict but prior to entry of a final, appealable judgment?

RULE 29.6 STATEMENT

The Respondent BankAtlantic Financial Corporation is now known as BFC Financial Corporation, which is the largest shareholder in BankAtlantic Bancorp, Inc., which in turn wholly owns BankAtlantic, a Federal Savings Bank.

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BRIEF IN OPPOSITION OF BANKATLANTIC FINANCIAL CORPORATION AND ALAN LEVAN

Respondents, BankAtlantic Financial Corporation ("BFC") and Alan Levan ("Levan") request that the petition for writ of certiorari be denied. The facts are not as ABC states them. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994) has nothing to do with this case. Moreover, ABC had no basis, whether as a matter of right or permissively, to intervene in the *Purcell* class action litigation for the purpose of preventing a settlement between the parties to that litigation.

OPINIONS BELOW

ABC has not included in its appendix the two Reports and Recommendations of the Magistrate Judge in the *Levan* libel case that are referenced in ABC's petition to this Court. They are appended to this brief.

STATEMENT OF THE CASE

A. The Underlying *Purcell* Class Action

The plaintiffs in the underlying class action (the "*Purcell*" class action) were investors in three real estate limited partnerships. R1-1. Each of the *Purcell* investors had voted against a proposed exchange transaction in which the assets of the three partnerships were exchanged for corporate debentures issued by BFC, a parent of BankAtlantic, a Federal savings bank. R1-1. As a result of the exchange transaction, BFC ended up with the assets of the partnerships, including real estate, mortgages and cash, but it also ended up with the liabilities of the partnerships, including mortgage debt, payables and environmental liabilities. R10-343-1106-1112. The exchange transaction was consummated, despite the negative votes of the *Purcell* plaintiffs, because a majority of the limited partners in each partnership voted in favor of it.

In connection with the proposed exchange, BFC had prepared and circulated, after review by the Securities and Exchange Commission, a detailed offering circular that was required to fully disclose all of the material facts that a reasonable investor would want to know about the transaction. R1-1-Ex. B. The prospectus, in fact, disclosed in considerable detail the terms and conditions of the exchange, the risks of the exchange, the possible adverse events that could have occurred, and an opinion of fairness by an investment banking firm. R1-1-Ex. B.

The prospectus also included a statement that BFC and its principals believed the transaction to be fair, although BFC qualified that opinion of fairness in a number of

particulars. Among other things, BFC noted that its opinion of fairness should be considered in light of its fully disclosed conflicts of interest and economic interest in the transaction. R1-1-Ex. B. at 5, 13, 35, 47 and 49. Moreover, BFC stated that in making its determination of fairness, it did not consider that a market would ever develop for the BFC debentures. R1-1-Ex. B. at 47.

BFC's fairness statement became the crux of the *Purcell* litigation. Initially, the plaintiffs had brought a series of contract, common-law, and securities claims allegedly arising out of the exchange. R-1-1. By the time the case went to the jury, however, only one discrete issue survived: Did BFC and Levan violate the disclosure requirements of federal securities laws by opining in the offering circular that the transaction was fair when in fact they believed otherwise?

The essential argument advanced by the plaintiffs as to the alleged unfairness of the transaction was that the value of the debentures given in the exchange was neither the expressly stated face amount of the notes nor some lesser amount reduced to present value, but, instead, was the market value for the BFC debentures in a market that never developed. R6-339-263-265; R9-342-885. Plaintiffs argued to the jury that since the debentures had little or no "market value," as they described it, the exchange could not possibly have been "fair" and BFC must have known that "fact" even before stating otherwise in the offering circular. Plaintiffs advanced this theory despite full and complete disclosure throughout the offering circular of the possibility that no market would develop for the debentures, a disclosure that is conspicuously and repeatedly stressed in the first three pages of the circular. R1-1-Ex. B. In this manner, what had been pleaded as a "disclosure" case under the securities laws became instead a case in which the jury was simply allowed to determine if, with the benefit of hindsight, they thought the transaction was fair.

The jury found that BFC and Levan falsely stated that they believed the transaction to be fair and found that the plaintiffs were damaged by that false opinion. They returned a verdict in favor of the class of plaintiffs, awarding them a total of $8 million in damages (based on a jury instruction which stated that such a verdict would have the effect of cancelling the outstanding debt owed by BFC to these same plaintiffs, a debt in the face amount of $16.5 million plus interest in excess of 10%). R2-292.

Put most charitably, plaintiffs' case to the jury was deficient of relevant evidence. For example, although no one could argue that essential elements of a securities violation are materially false or omissive statements that were relied upon to cause a loss, not one single witness testified that a single voter who approved the transaction relied upon Mr. Levan's opinion of fairness in voting for the transaction or thought it was material. No evidence was offered that any investor, much less enough investors to have swayed the vote, relied upon the heavily qualified opinion of fairness of BFC and Levan or thought it was material. Indeed, to the extent there was any evidence about this element of a securities claim, the plaintiffs testified that they would never have relied upon or considered Levan's opinion of fairness to be material because Mr. Levan admitted in the disclosures that he had conflicts of interest, because he said he was not objective, and because he said, that in giving his opinion, he was not considering the existence of any market for the debentures. R9-342-899. Each of the testifying plaintiffs expressly stated that they formed their opinion to vote against the proposed exchange by reading the plain language in the prospectus disclosing the risks and conflicts. R9-342-722, 899; R6-339-206, 218; R12-345-1460.

In addition, the plaintiffs offered no evidence that Alan Levan and BFC did not believe the transaction to be fair. Instead, they simply offered evidence that *they* thought the deal was unfair because it offered long-term debentures in exchange for their limited partnership interest in real

estate. The jury was no doubt swayed by the repeated testimony of several elderly investors that at their age, they did not like the long-term aspect of the debentures, including the comment of one witness that "I don't even buy green bananas any more." R3-447-2-4.

Not only was the jury verdict unusual given the absence of a proper evidentiary foundation, its practical effect was also unique. Although the reputations of BFC and Mr. Levan were no doubt sullied by an adverse verdict in this securities case, the practical result of the case as a whole—finding liability for $8 million while extinguishing liability in the face amount of $16.5 million plus interest running at well over 10%—was of substantial economic benefit to BFC. R2-345-1555.

B. The Trial Judge Enters An Interlocutory Order

After the jury verdict, but before resolution of the post-trial motions and several other pending issues, the court entered an order based upon the verdict, which order was erroneously entitled "Final Judgment." R2-314. BFC believed that the order was not in fact a final judgment because of the other substantial issues that were still left to be resolved by the parties and the court. Among the other matters that had not yet been ruled upon by the trial judge, there remained complex issues on how to give effect to the jury instruction that a verdict for damages in favor of the plaintiff required a return of the outstanding debentures. R2-292. Given the title of the interlocutory order, however, BFC felt compelled, in an abundance of caution to appeal the order. R2-369. On February 11, 1994, the Eleventh Circuit confirmed BFC's belief by formally determining that the order in fact lacked the requisite finality, and it dismissed the appeal. R2-419.

C. The Trial Court Encourages Settlement

Throughout the trial and post-trial hearings, the presiding judge pointedly remarked to counsel for the parties

about the lack of evidence supporting the verdict. The court observed that the jury's verdict "did not comply with any of the evidence" and did not "rest on solid judicial concepts." R14-379-13, 31. The court also remarked: "If I were a trier of fact I wouldn't have found this way" and "I wouldn't be surprised at all if this case got turned around." [1] R15-409-31, 32.

The court's comments regarding the lack of support for the verdict, coupled with the prospect of more litigation in the district court (and likely appeals), did in fact prompt the parties to structure a settlement. Settlement was also facilitated by very unusual circumstances: The verdict of $8 million was actually millions of dollars *less* than the amount which BFC consistently maintained was owed to the class. R2-345-1555. Indeed, the settlement provided for the elimination of corporate debt reflected in the debentures of $16.5 million, earning interest at well above market. And, as the district court observed, the verdict was based upon the jury's erroneous conclusion that BFC violated the securities laws. R14-379-13, 31; R3-447-3, 4.

The ground for a settlement was thus established. BFC was not opposed to paying the $8 million—indeed, it recognized its obligation to pay much more—but BFC and Levan simply could not live with the erroneous ver-

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[1] Having made these telling observations, why did the trial court deny post-trial motions? The court addressed this issue succinctly:

> There are certainly enough legal issues in this case, and I have already denied the post-trial motions for remittitur and judgment NOV. *My experience with the Eleventh Circuit is that they don't like trial judges tampering with jury verdicts. It's all right for them to do it, but they don't want us to do it,* so whether they do it or not, that's—we will find out, but they certainly have got enough legal issues to consider *and I wouldn't be surprised if they did something with it,* but every time I do something they say you are just disagreeing with the jury.

R14-379-4 (emphasis added).

dict, particularly because their business is in the highly regulated area of banking. The class wanted to settle because it knew that the verdict was subject to reversal on appeal, having been expressly told by the presiding judge that the judgment stood on very shaky legal grounds. In sum, the class wanted to settle for the amount of the verdict, and BFC was willing to settle for that amount and forego its right to an appeal if the erroneous jury verdict and interlocutory order were vacated.

D. BFC Files A Defamation Action Against ABC

In 1991, representatives from ABC's news magazine "20/20," including William H. Willson, a petitioner here, began to pursue a story about "real-estate roll-ups." BFCApp. at 1a. On November 29, 1991, prior to the trial in *Purcell*, the story, entitled "Too Good to Be True," was broadcast. BFCApp. at 2a. The story discussed so-called "roll-ups" in which the real estate holdings of partnerships are exchanged for some other investment. BFCApp. at 2a. BFC's exchange transaction was deemed by ABC to be a "roll-up," and it was the purported focus of the story. BFCApp. at 2a-3a. In fact, the story was a very nasty and personal character assassination of Mr. Levan.

On February 7, 1992, BFC and Levan filed a complaint because of ABC's broadcast ("the *Levan* action"). BFCApp. at 5a. In February 1993, ABC moved for summary judgment, contending that the interlocutory order entered in *Purcell* precluded BFC from bringing its defamation action. BFCApp. at 8a. The Magistrate in *Levan* filed his first Report and Recommendation on July 22, 1993, recommending that ABC's motion for summary judgment be granted on estoppel grounds because of the so-called "final judgment" in the *Purcell* class action. BFCApp. at 18a.

In the text of his report, however, the Magistrate observed, with regard to the 20/20 broadcast, that "many

of the individual statements in the story were misleading, if not completely false," and then he listed "some of the more egregious examples." BFCApp. at 16a-17a. In that context, the Magistrate noted that ABC "took license with the facts"; that ABC used "tactics [which] allowed [them] to use Levan's own words to produce false or misleading impressions"; and that ABC utilized "reprehensible" and "crafty" editing techniques to convey false images. BFCApp. at 16a-17a. Ultimately, the Magistrate concluded that ABC's practices were "shamefully irresponsible," and that ABC "cared more about telling a good story than an accurate one." [2] BFCApp. at 17a.

E. ABC Seeks Intervention To Block The Settlement

By this point, the parties in the *Purcell* case had decided to settle. BFCApp. at 21a. So, more than five years after the *Purcell* action was commenced, and after the parties had reached settlement of the underlying litigation, ABC filed a motion for intervention to prevent the parties from consummating the settlement. R2-419. Significantly, ABC failed to request permission to file an *amicus curiae* brief to raise any public interest issues.

In its motion for intervention, ABC contended that although it was not a real party in interest in the transaction that was the subject matter of this case—the exchange transaction—it should nevertheless be allowed to intervene because it wanted to preserve for itself the interlocutory order for its own use in the *Levan* action. R2-419-6. In its memorandum, ABC briefed both the issues of intervention as of right and of permissive in-

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[2] On August 4, 1993, ABC filed objections to the Magistrate's Report and Recommendation, specifically asking the court to strike the Magistrate's blistering critique of its behavior. In fact, the Magistrate had been careful to use as examples of ABC's misbehavior facts which were not arguably at issue. On August 31, 1994, the *Levan* Court declined to grant ABC's objections. Order on Defendants' Objections to the Magistrate's July 22, 1993, Report And Recommendation.

tervention. R2-419-20. The district court, however, recognizing that ABC has no legal right at stake in this class action, rejected ABC's novel proposition and denied its motion to intervene by orders dated June 30, 1994, and July 15, 1994. R3-423; R3-429. ABC appealed the latter order on August 3, 1994. R3-441.

F. The Hearing To Approve Class Settlement

The parties in the *Purcell* action drafted a proposed settlement in June of 1994. R3-443. Then, on September 12, 1994, the district court held a settlement conference so that any party could voice objection to the terms of the proposed settlement. R16-452; R3-447.

ABC's representative attended the conference, but articulated no objections when queried by the court. Indeed, the district court began the hearing by stating: "Have there been objections or anyone want to be heard on this matter?" No one responded. R16-452-2. When the Court later noted its surprise that no one from ABC was present at the hearing, BFC's counsel pointed out that an attorney for ABC was indeed present. When invited to speak, ABC's counsel noted that "I don't believe I have standing to address this issue right now." He stated that "quite frankly, I was not prepared to address the Court on this topic today." R16-452-11.

After this exchange, the court inquired what value (be it evidentiary or estoppel) the vacated "judgment" would be to ABC. The parties explained in no uncertain terms that the vacated order would have *no* value to ABC, and that if it did have any such value to ABC, then BFC would prefer to proceed to appeal. R16-452-5-7.

G. The Court Finds The Settlement Fair, Reasonable And Adequate

Thus, on September 12, 1994, the district court, which had presided over this class action for more than five years, entered its Final Judgment Approving Settlement

And Order of Dismissal ("Final Judgment"). R16; R3-447. This was the first true "final judgment" entered in the *Purcell* action. The Final Judgment, which approved the settlement and vacated the earlier interlocutory order that had been erroneously denominated as a final judgment, includes the following findings of the court:

> 1. As previously observed by this Court, in the trial of this cause, the court entertained serious doubt as to the merit of the case brought by plaintiffs. The court found during the pre-trial and trial that the disclosure document distributed to the former limited partners of the three partnerships fully and adequately disclosed the terms of the proposed transaction and the risks of the proposed transaction. The aspects of the proposed transaction that plaintiffs contended at trial to be unfair, were fully and adequately disclosed to the plaintiffs in the disclosure documents. Indeed, these plaintiffs, who each voted against the transaction, did so in large measure because what they read about the transaction in the prospectus persuaded them that it was not in their best interest.
>
> 2. The claim asserted under the principles of *Virginia Bankshares v. Sandberg*, 111 S.Ct. 2749 (1991) that, notwithstanding the adequacy of disclosure, defendants' stated opinion of fairness while allegedly believing otherwise, was a troublesome one for the court because of the adequacy of risk and conflct disclosure, because the evidence that anyone relied upon that opinion was scanty at best, and because the evidence that BankAtlantic Financial Corporation and Alan B. Levan believed the transaction to be unfair was weak, particularly since BankAtlantic Financial Corporation agreed to pay more for the former partnership assets than those assets turned out to be worth, albeit over a lengthy time period.
>
> 3. The court was also concerned that a jury might make a decision in this case not on legal principles

but on their own judgment of whether they thought the proposal was fair, regardless of the merit of the claim. That concern was heightened by the fact that their decision could easily have been influenced by the progression of elderly claimants who did not want twenty year debentures regardless of the fairness of the proposed transaction ("I don't even buy green bananas any more") or by the extensive adverse pre-trial publicity. In fact, as this court has observed on several occasions earlier, the evidence offered in support of the verdict did not persuade the court and, had the case been tried, non-jury, would have resulted in a judgment in favor of the defendants.

5. The court previously observed and continues to believe that an appeal of the judgment in this case is hardly frivolous. The court has serious reservations about the award and has serious reservations about the legal rulings upon which it is based. In denying directed verdict and motions to set aside the verdict, the court was hardly convinced that the result rested on a solid legal or factual base, but was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review.

6. The terms of the settlement of this case are conditioned upon setting aside the verdict of the jury and the final judgment in this cause. This court has no reservation whatsoever in doing so.

R3-447-2-4.

Based on these findings, the court ruled as follows:

4. Having balanced the competing values of finality versus the right to relitigate an unreviewed dispute in light of the circumstances of this action as set out more fully in the Settlement Agreement, the December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, col-

> lateral estoppel, or other preclusive effect whatsoever, for use against defendants, its successors or assigns, by plaintiffs or any third parties.

R3-447-6-7.

The district court, very much aware of the weak underpinnings of the jury's verdict, had "no reservation whatsoever" about vacatur, or holding that it "shall have absolutely no force or effect, including, but not limited to any res judicata, collateral estoppel, or other preclusive effect whatsoever." R3-447-4, 7. While the Final Judgment was prepared by Levan's counsel and approved by Purcell's counsel, a fact which ABC argues diminishes its significance, in fact, the statements of the trial court criticizing the jury deliberations and the evidence came directly from comments made by the trial court during the trial and thereafter on the record.

Although the trial court had previously denied ABC's motion for intervention, ABC nonetheless filed an appeal of this Final Judgment as well. R3-453. By contrast, no party to the *Purcell* action appealed the Final Judgment.

H. The Magistrate's Report In *Levan* Is Referred Back

In an order dated June 6, 1994, the *Levan* court recognized that the settlement and vacatur of the interlocutory order in *Purcell* would impact whatever collateral estoppel effect the order might have had, thus eliminating the sole basis for the Magistrate's recommendation for summary judgment. R3-427-Ex. I. In its order, therefore, the *Levan* court rejected the collateral estoppel portion of the Magistrate's Report and Recommendation relating to ABC's motion for summary judgment and referred the matter back to the Magistrate for further consideration. R3-427-Ex. I.

Upon reconsideration by the Magistrate of ABC's motion for summary judgment, ABC claimed, as it does here, that the *Purcell* record established that the Final Judg-

ment and vacatur was nothing more than a "buy-off" of the verdict by BFC, and therefore violated the general principles of *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 115 S. Ct. 386 (1994). BFCApp. at 24a.

I. The Magistrate's Second Report And Recommendation In *Levan*

After a thorough review of the record, the Magistrate in *Levan* filed his second Report and Recommendation on April 17, 1995, which recommended that ABC's motion for summary judgment be denied. BFCApp. at 32a. The Magistrate specifically rejected ABC's "buyout" argument, and held that, even if he had the equitable power to review the district court's decision to vacate the interlocutory order in *Purcell,* he would find that the "vacatur was proper even under the reasoning set forth in *U.S. Bancorp.*" BFCApp. at 28a.

Specifically, the Magistrate held that:

> the record in *Purcell* indicates that the vacatur was based on more than a wealthy litigant's buy out of an unfavorable judgment. Rather, the *Purcell* final judgment included specific findings in which the [trial court] expressed its belief that the judgment had weak underpinnings, was likely to be overturned on appeal, and noted the possibility of jury bias. *These findings were consistent with the court's commentary made throughout the trial.*

BFCApp. at 28a (emphasis added).

Based upon his own review of the *Purcell* record, the Magistrate further stated that "the record here shows that the *Purcell* consent decree received careful scrutiny." BFCApp. at 28a n.2. He added: "[T]he vacated judgment in *Purcell* is insufficient to preclude the litigation of any of the issues in the instant case. To hold otherwise would prevent a trial on the merits of this action based upon a judgment in a separate action which neither the

parties to the prior litigation, nor the trial judge, believes is valid." BFCApp. at 28a-29a.

The Magistrate concluded his report with the following observation:

> Finally, the undersigned believes that the public interest dictates that the merits of *Levan* be decided by a jury at trial. The First Amendment guarantees the press a right to engage in rasping and controversial discussions on all topics of public interest. However, it does not guarantee a defense against libel. So far, the public has only heard one side of the story, that is, the "20/20" broadcast. Certainly, public interest dictates that both the content of the broadcast and its production deserve scrutiny on the merits. In such cases summary judgment is not appropriate.

BFCApp. at 32a.

J. The Eleventh Circuit's Decision In This Case

Not surprisingly, the Eleventh Circuit affirmed the *Purcell* court's denial of ABC's attempt to scuttle the settlement in the underlying class action case. App. 12a. Relying upon well-established precedent, considering the very limited interest ABC had in the class action case, and recognizing the absence of any direct authority to support ABC's "unprecedented" claim for intervention, the Eleventh Circuit held "that ABC lacks sufficient interest in the class action to permit intervention as of right, and that the district court did not abuse its discretion in denying ABC's motion for permissive intervention." App. 2a.

In so holding, the Eleventh Circuit did not reject *U.S. Bancorp*. App. 6a. Instead, the court expressly stated that it did not reach ABC's arguments premised upon that decision because "we are persuaded that the district court properly denied ABC's motion to intervene," which sought intervention both as of right and permissively. App. 6a. The court explained that upon a determination the district

court's disposition of the motions to intervene was correct, its jurisdiction evaporated, citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989). App. 6a.

The Eleventh Circuit affirmed the district court's decisions on intervention for a number of reasons. Among other points, the court noted ABC's own admission that it was not a real party in interest to the exchange transactions that were the basis of the *Purcell* class action. App. 8a. Moreover, the court recognized that "ABC's interest in the collateral estoppel effect of the jury's verdict in this case is too collateral, indirect, and insubstantial to support intervention as of right." App. 9a. The court also recognized that ABC's argument in support of permissive intervention—a claim that no party to the underlying class action would be prejudiced by vacating the jury verdict and the order based upon that verdict—was "woefully unconvincing." App. 11a. As the court explained, "the result ABC seeks would effectively vitiate the settlement agreement through which the plaintiffs are receiving payments from the damage award." App. 11a.

Finally, the Eleventh Circuit noted that a nonparty such as ABC "is not necessarily entitled to preserve the beneficial effects of a jury verdict and judgment, however much the nonparty may cherish those effects." App. 11a. An opportunity to preclude issues as a result of litigation involving other parties is not some absolute right. "Moreover, ABC will have its day in court. In the trial of the libel lawsuit, ABC will have an opportunity to establish in the old-fashioned way the defense it sought to preclusively establish with the class action jury verdict and judgment." App. 11a.

The jury trial of the libel action referred to by the Eleventh Circuit is presently set to begin in October 1996.

REASONS FOR DENYING THE WRIT

A. *U.S. Bancorp* Does Not Apply To This Case

This case does not raise any question about *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S.Ct. 386 (1994), let alone some question about "enforcement" of that ruling. In its excessive zeal to manufacture an issue for this Court's review, ABC has attempted to stretch the "rationale" of *U.S. Bancorp* beyond the facts, beyond the question presented, beyond the holding, beyond the dicta, and even beyond the underlying statutory authority of that case. In short, ABC has stretched its argument well beyond the breaking point.

In the first place, the facts in *U.S. Bancorp* bear no resemblance to the facts in this case. In *U.S. Bancorp*, vacatur was sought in *this* Court, not in a Court of Appeals, and, even more importantly, not in a district court, as occurred here. 115 S.Ct. at 389. In *U.S. Bancorp*, vacatur was sought by only one of the settling parties and was *opposed* by the other settling party, totally unlike the situation in the present case. *Id.* And finally, in *U.S. Bancorp*, vacatur was sought only after appellate jurisdiction had vested, whereas no appellate court had jurisdiction in this case when the order in question was set aside by the district court. *Id.* The factual patterns in *U.S. Bancorp* and the present case could not be more dissimilar.

Dissimilar, too, are the questions presented. In *U.S. Bancorp*, the question was "whether *appellate courts* in the federal system should vacate civil judgments of subordinate courts in cases that are settled *after* appeal is filed or certiorari sought." *Id.* at 388-89 (emphasis added). In the present case, a district court set aside an interlocutory order before any appellate jurisdiction attached. Even this Court's express holding in *U.S. Bancorp*—"mootness by reason of settlement does not justify vacatur of a judgment *under review*"—does not, on its face, apply to the

present case. *Id.* at 393 (emphasis added). There was no review pending when the order on the jury verdict was set aside by the district court here.

Even the more broadly ranging discussion by this Court about the effect of its holding in *U.S. Bancorp* was strictly limited to situations where appellate review of a final judgment—totally unlike the situation in the present case —was ongoing at the time of settlement and vacatur. *Id.* at 392-93. Indeed, during the course of that discussion, the Court specifically distinguished those cases in which settlement occurred while the case was still before the district court. *Id.* at 393. For example, this Court noted that "the judicial economies achieved by settlement at the district-court level are ordinarily much more extensive than those achieved by settlement on appeal." *Id.*

Finally, the statute that supplies "the power of vacatur" (28 U.S.C. § 2106), which was the focal point of this Court's holding and discussion in *U.S. Bancorp*, has no application whatsoever to the present case. 115 S.Ct. at 389. That statute, on its face, applies *only* to "The Supreme Court or any other court *of appellate jurisdiction.*". *Id.* (emphasis added). Moreover, it is a part of Chapter 133 of Title 28, the subject of which is limited to appellate review. The statute expressly does not apply to district courts, the level of court that set aside the order in this case.

Perhaps that explains why all of the case authorities cited by ABC in an attempt to support its argument on vacatur involved only situations where appellate jurisdiction had been invoked and where *appellate* courts were being asked to set aside either appellate court decisions or lower court decisions. *See Izumi Seimitsu Kogyo Kabushiki Kaisa v. U.S. Philips Corp.*, 114 S.Ct. 425 (1993) (where even the motion for intervention, as discussed by ABC, was filed in an *appellate* court, not the district court); *Clarendon Ltd. v. Nu-West Industries, Inc.*, 936

F.2d 127 (3d Cir. 1991); *In re United States,* 927 F.2d 626 (D.C. Cir. 1991) (seeking vacatur of an *appellate* court decision); *In re Memorial Hospital,* 862 F.2d 1299 (7th Cir. 1988). Decisions by district courts to set aside their own orders or judgments constitute an entirely different subject matter.

The present case is not, therefore, a *U.S. Bancorp*-type case or even a potential extension of it; the present case is an entirely different situation. ABC wants this Court to simply gloss over that fact, however, and extend the holding of *U.S. Bancorp* to a territory where it has no application. In essence, ABC asks this Court to take a giant, blind leap over a grand canyon and, on new soil, firmly implant rules designed to guide appellate courts onto district court judges.

ABC asks this Court to use those inapplicable appellate court principles for the purpose of severely restricting, or nearly abolishing, the power of trial judges to alter, amend, or set aside their own orders and judgments or the verdicts of juries. Moreover, ABC wants this Court to take that giant step without any consideration of the numerous rules, statutes, and decisions covering the power of district courts to affect their own prior decisions, especially the broad power to alter or set aside interlocutory orders and judgments. *See, e.g.,* Advisory Committee Notes to the 1946 Amendment to Rule 60(b), Federal Rules of Civil Procedure ("interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires"); *United States v. Jerry,* 487 F.2d 600, 605 (3d Cir. 1973) ("so long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so"); *Mateo v. M/S Kiso,* 805 F.Supp. 761, 785-86 (N.D. Cal. 1991).

Thus, even if this Court were inclined to elaborate on the vacatur issue or to consider means to enforce its hold-

ing on vacatur in *U.S. Bancorp*, this would not be the appropriate case in which to do so. To consider ABC's petition, this Court would have to extend *U.S. Bancorp* well beyond vacatur of final judgments to the point of considering, under rules designed for appellate courts, the setting aside by a district court of its own interlocutory orders. Moreover, this Court would be required to undertake its review in a case where the circuit court never even reached the issue. Needless to say, ABC's radical and thoroughly unprecedented request to throttle district court judges without even adequate consideration of the consequences should be summarily rejected.[3]

B. ABC Had No Basis To Intervene In The *Purcell* Class Action

As this Court has previously explained, the question of "[w]hether petitioner should have been granted leave to intervene is quite distinct, both analytically and factually, from the question of whether the Court of Appeals should vacate judgments where the parties have so stipulated." *Izumi*, 114 S.Ct. at 427. A question concerning intervention is "akin to a question regarding a party's standing,

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[3] ABC repeatedly invokes the argument that injustice results when wealthy parties can "buy off" judgments. Totally apart from the fact that nothing ever happened to any truly final judgment in this case, it is highly ironic that ABC should be trying to cloak itself in the garb of the poor or the weak.

Not only is the "buy off" argument not factually supported, the claimed preclusive effect in this case has value *only* to ABC, a corporate colossus whose power and wealth vastly exceed that of all the plaintiffs and defendants in the *Purcell* action combined. Only the private economic interest of ABC's even more powerful and wealthy shareholders is at stake here.

ABC simply wants to avoid the expense and—given its truly egregious misbehavior in the broadcast attack on BFC and Mr. Levan—the likelihood of a loss when it faces a jury. In its zeal to promote its own economic interest, ABC has been quite willing to utterly destroy the settlement that the district court judge expressly approved. ABC's claim to be promoting the public interest is hollow indeed.

which [this Court has] described as a 'threshold inquiry' that 'in no way depends on the merits' of the case." *Id.* In a case such as the present one, where a *district* court rather than a Court of Appeals vacated an interlocutory order, any questions relating to intervention are even more "distinct" from the "merits" of vacatur than as discussed in *Izumi*.

Moreover, as this Court has further explained, decisions on any particular motion to intervene are "always to some extent bound up in the facts of the particular case." *Id.* at 428. That being the case, this Court has concluded it would have to be a very unusual situation to warrant the grant of certiorari to review solely the "relatively factbound issue" of intervention in a Court of Appeals decision. *Id.*

There is absolutely nothing unusual in the Eleventh Circuit's review of ABC's motion for intervention in this case. In fact, the Eleventh Circuit's decision is *solely* a garden variety intervention decision. As explained above, enforcement of the vacatur decision by this Court in *U.S. Bancorp* is not implicated in the present situation. Nor were there any issues of broad public interest or importance involved in *Purcell*, the underlying case in which ABC sought to intervene. Indeed, the only issue implicated by ABC's motion to intervene was ABC's economic self-interest. The fact that ABC will have to face a jury in the *Levan* case is hardly an issue of sufficient importance to warrant review by this Court.

Although ABC argues that a conflict between the circuits exists as to the standards for intervention as of right,[4] ABC does not argue that the alleged conflict is itself a sufficiently significant issue to warrant this Court granting the requested writ. It is only in the context of the inappropriately claimed need to "enforce" *U.S. Ban-*

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[4] ABC raises no issue in this Court about the denial of its motion for permissive intervention.

corp that ABC contends the "conflict" attains such significance. Considering that *U.S. Bankcorp* is fundamentally irrelevant to the present case, the significance, if any, of the alleged conflict for this case diminishes to the vanishing point.

Additionally, the "conflict" may actually be, more than anything, a result of the "relatively factbound" nature of motions for intervention, to use this Court's term, than a true conflict in legal principles. That is, the "conflict" may be more linguistic than real, with the real problem being the difficulty of setting forth black letter rules for a subject matter that depends heavily on the facts of each case. *See, Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) ("Since this task [deciding whether intervention of right is warranted] will depend upon the contours of the particular controversy, general rules and past decisions cannot provide uniformly dependable guides.").

After all, as ABC points out, this Court has itself already twice addressed the issue of the interest necessary for intervention as of right. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Donaldson v. United States*, 400 U.S. 517 (1971). And the most recent of those decisions (*Donaldson*) was even cited by the Eleventh Circuit as one of the authorities for its adoption of the standard that intervention of right "must be supported by 'direct, substantial, legally protectible interest in the proceeding.' " *Athens Lumber Co., Inc. v. Federal Elections Commission*, 690 F.2d 1364, 1366 (11th Cir. 1982).

Moreover, even if one were to accept that a conflict exists, the notion of "interest" in the "less restrictive" cases cited by ABC is far different than the type of interest advanced by ABC in this case. The "interest" involved in those cases focuses on the extent or degree to which there must be a real involvement of some kind by a prospective intervenor in the subject matter of the underlying lawsuit to intervene as of right. *See County of*

Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967).

ABC has absolutely no such interest. ABC has not claimed to be an investor in any kind of real estate limited partnership for which an exchange offer has been made. Nor has ABC claimed to be engaged in the business of real estate limited partnerships, let alone ever actually been involved in an exchange transaction of any kind. ABC's claimed interest—in a jury verdict against BFC and Levan—is collateral and far more remote. That is not the kind of "interest" contemplated by Rule 24. *See Donaldson*, 400 U.S. at 531.[5]

Even if this "conflict," despite its relative insignificance compared to other issues faced by the Court, were to be a subject of review, this is not an appropriate case in which to undertake the review. As ABC itself admits, it has no direct interest in the subject matter of the underlying *Purcell* case. ABC is a total stranger to that litigation, never having had any stake, however remote, in the exchange transaction. If review of this particular case were undertaken, therefore, the Court would have no factual basis with which to even attempt further refinement of the meaning of an "interest" sufficient to grant intervention as of right. Even if the Court were prepared to take the extreme position that the mere possibility of collateral estoppel effect without more is sufficient to allow intervention of right, the Court, to accept this case, would

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[5] This Court's opinion in *Donaldson* strongly suggests that the Court would hold against ABC if it were to hear the case on the merits. The Court rejected, as not "the kind [of interest] contemplated by Rule 24(a)," a movant's argument that he should be allowed to intervene because a lower tribunal's decision whether to require production of certain documents from a third party would have a collateral effect on his own subsequent trial. 400 U.S. at 531. The Court further noted, in a manner similar to the observation of the Eleventh Circuit in this case, that the movant's interests may be asserted "at its proper place in any subsequent trial." *Id.*

also have to be prepared to take a still more extreme step and hold that upon the return of a jury verdict, even before entry of a final judgment, anyone who might be able to claim some form of preclusive effect is entitled to intervene as a matter of right.

This is also not an appropriate case to consider the "conflict" because there were no questions of great general importance or broad public interest in the issues that were actually litigated in the underlying class action. It was a "disclosure" case under well-established securities law. Although highly important to the parties, it was of no interest to the public. Not even the general issue of "roll-ups," a subject of the libelous ABC broadcast, was featured in the trial. The only question considered by the jury was whether BFC and Levan actually thought the exchange transaction was fair. As evidence of the lack of public importance, it should be noted that ABC did not even try to file an *amicus* brief. There is, therefore, no basis at all in this case for the Court to hold, even if it were so inclined, that the mere existence of important policy issues in a case could support intervention as of right.

It comes down to this: ABC wants the Court to instruct all district courts that they *must* allow intervention *as of right* whenever any party claims that a jury verdict (or, at least, a jury verdict followed by some form of interlocutory order) might afford that party some preclusive effect. For ABC it is not enough that district courts can, in the exercise of their sound discretion, permit intervention on a permissive basis to promote judicial economy or other objectives. ABC seeks an absolute right of intervention in the most extreme of circumstances to promote its own self-interest. That is, ABC wants this Court to expend its valuable resources to create an outlandish rule of sweeping and unprecedented impact so that ABC will not have to face a jury in one particular case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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